No. 2663

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARIZONA COPPER ESTATE,
Appellant,

vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
Appellees.

APPELLANT'S PETITION FOR A REHEARING.

J. N. GILLETT,
F. A. CUTLER,
BEN C. HILL,
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Counsel for Appellant and Petitioner.

Filed this.....day of January, 1917.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

F. D. Monckton,
Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes appellant by its counsel, and applies for a rehearing and a reconsideration by the Court of its opinion and the judgment and decree thereon, and assigns the following reasons therefor:

We appreciate the fact that the time of this Court is fully occupied in its consideration of pending cases before it and it would be loath to reopen a case unless good and sufficient reasons should appear

therefor. We also appreciate however that the facts as found to exist in a given case should be fully understood. We, therefore, ask the indulgence of this Court while we give a brief recital of the facts established by the evidence herein and which do not appear in the opinion. We respectfully submit that if these facts do appear in the record, they do not support the language contained in the opinion, "The contention of appellant if sustained here, would result in a monstrous fraud". Precisely the same state of facts have been presented to Federal Courts in other cases, including the United States Supreme Court, and the view adopted by those Courts is at variance with the one expressed in the opinion herein. We earnestly urge this Court to give the following petition the same careful and respectful consideration with which it was prepared.

In the year 1899, or fifteen years prior to the filing of the bill of complaint in this action, three men of mature years and of unusual experience in the business, commercial and public affairs of life, entered into negotiations concerning the sale and purchase of certain property. After a fair and full discussion of all the details of the subject-matter, one of the parties, the president of a bank, lawyer and real estate speculator, who had participated in all of the negotiations as a vendor, was delegated to prepare necessary written instruments expressive of the final agreement of the parties. These instruments were duly executed

and made a matter of public record. A partial consideration of $5,000 cash was paid to the vendors and $100,000 in notes secured by a mortgage on the property was executed and delivered to them. The present action is not one to reform or rescind; there is no charge here of fraud, mistake or omission. It is not claimed that the instruments upon their face are vague, uncertain or ambiguous or differ in any respect from what the parties executing the same, styled and titled them when prepared and recorded. But, after fifteen years have passed since their execution, on the recollection of one of the actors (Syme) who committed the preparation of the legal papers to his associates (Mathews and Dorsey) and on the ex parte affidavit of one of the three (Dorsey), which affidavit was taken beyond the jurisdiction of the Court and without any opportunity being afforded for cross-examination and whose admission in evidence violates every rule of law, the lower Court finds that the instruments in question are not what they purport to be upon their face, but are something which the frail memory or imaginations of ancient witnesses desire them to be.

The application of the rule excluding parol evidence is promptly invoked by courts when they are asked to accept opinions and interpretations based upon ancient conversations and negotiations which confessedly became merged in a written instrument. Plaintiff's case consists of the deposition of Col. Syme taken in Washington, D. C., and the *ex parte*

affidavit of Senator Dorsey taken at Los Angeles without notice. The evidence of Col. Syme appearing in the abstract is in narrative form. It really consisted of a mere acquiescence to an agreement contained in a series of questions addressed to him by the attorney for plaintiff, of which the following is a sample (quoting from page 16 of the evidence):

> "Q. So, then, if I understand you, your proposal to Dorsey was that if he would pay you $5,000 personally, you would procure deeds to be executed to him or his nominee for the purchase price of $100,000, under an agreement that if the property was not paid for the title to it was to be in you and Captain Mathews. Is that substantially correct?
>
> A. That is my understanding, perfectly, about it."

The *ex parte* affidavit of Senator Dorsey amounts to nothing more than mere conclusions or opinions of his regarding the nature and effect of the transaction.

The rule was succinctly stated by the Supreme Court of the State of California as follows:

> "The uncertain statements of Carmichael (here Syme and Dorsey) made years after the event under examination should not be permitted to prevail against the formal written declaration of the parties made at the time of the transaction and as a part of it."
>
> *Smith v. Goethe et al.,* 159 Cal. 628.

And again:

> "The rule is well established that oral testimony in contradiction of the plain terms of

a written instrument or of written admissions should be clear, full and precise and that the weight to be given to any such testimony diminishes with its distance from the date of the instruments which it purports to contradict or overcome."

In re Irvine, 102 Cal. 606.

It must be remembered that the instruments in question were prepared by the vendors, the then owners of the legal title (whose oral testimony is now relied upon to contradict their terms), and the recitals of said instruments are to be treated as an admission or declaration against interest and are in direct contradiction to their present testimony. Therefore, the Court is not confronted by that clear, full and precise character of oral testimony that is uniformly required by courts when they are called upon to overturn and destroy the plain terms of a written instrument.

There cannot be any question that the deed was intended to convey the title in fee from the then owners to the defendant and that a return mortgage was accepted as security for the promissory notes executed in payment of the property. The property had no real market value. The title became involved in doubt and the holders of the mortgage and notes deemed that the security was not sufficient to warrant them commencing foreclosure proceedings. In 1907 the present plaintiffs, attorneys at law, took a chance, in the vernacular of the street, by accepting a deed without any consideration being paid therefor, and eight years later instituted the pres-

ent action, when they thought the property had assumed some value. We are unable to see where any great fraud was perpetrated against the plaintiffs in this action, who never paid a dollar for the property.

The opinion herein recites "the contention of appellant if sustained here would result in a monstrous fraud". And again, "Every consideration of justice and equity requires that the real intention of the parties be given effect". In other words, at this late day this Court, in the absence of any evidence of fraud, mistake, undue influence or omission in the preparation and execution of the papers, adopts an interpretation contrary to the express terms of the instruments based upon the recollections of parts of conversations that occurred between the parties fifteen years ago. If the parties prepared these instruments with knowledge of the full meaning and import of the covenants now sought to be corrected, then according to the present contention they did so in reliance upon an assurance or agreement contrary to the import of the terms employed that it was mutually understood that the instruments on their face did not mean what they said.

As was said in the case of *Simpson v. U. S.*, 172 U. S. 372, 379 (opinion by Chief Justice White):

> "The written contract merged all previous negotiations and it is presumed in law to express the final understanding of the parties. *If the contract did not express the true agreement it was the claimant's folly to have signed it.*

> The court cannot be governed by any such outside consideration."

The same doctrine was announced in the case of *Great Western Manufacturing Co. v. Adams,* 176 Fed Rep. 326:

> "On this state of facts we think there is no equity in the present bill. If an injustice was done, it was invited by the complainant. Neither mistake, fraud nor accident brought it about. * * * Courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection."

In those cases as in this, the parties were neither laymen, women nor children, nor persons between whom confidential relations existed, but they were men of affairs, lawyers and business men who, when they prepared instruments in writing and attached their names to the same and filed them for public record, presumably knew what they were doing and if they were content to permit these instruments to remain of record for a period of fifteen years, then because of some change in the status of the property or of the persons interested, they should not be permitted to vary or alter the terms of written instruments as equity aids the vigilant and not those who sleep on their rights.

There is no evidence that a monstrous or any fraud was perpetrated fifteen years ago when these instruments were executed and the vendors were

contented with the $5,000 cash payment which they have retained, and were satisfied with a return mortgage on the property, the foreclosure of which they did not consider worth taking advantage of. If this opinion stands there is no such thing as security of title derived from instruments of public record which on their face are presumed to speak the truth and whose verity can only be impeached by appropriate actions instituted in our courts, supported by competent evidence.

In our briefs in this Court, we contended that certain well settled rules of evidence were violated and specified as follows:

1. *That although parol evidence is admissible to show that an absolute deed was intended as a mortgage such evidence is not admissible to show that a mortgage was intended as a deed.*

2. *That parol evidence is not admissible to show that an instrument on its face a mortgage was intended as anything but a mortgage.*

The three cases cited in the opinion herein were all actions to declare absolute deeds to be mortgages, and the cited text book references are expressly limited by their authors to actions to declare absolute deeds to be mortgages.

The record discloses no reason why established and uniform rules of law and equity should be swept aside and that which must be conceded to be a mortgage, transformed into something radically different from a mortgage, in order to

circumvent the statutes of limitation and the doctrine of laches.

The decision of this Court amounts simply to this; That sixteen years after the closing of a deed and purchase money mortgage transaction, and about ten years after the barring of the notes and mortgage by limitation, the testimony of an interested witness will be accepted and all judicial precedents defied, to allow representatives of the mortgagees to accomplish a daring and unprecedented perversion of the legal effect of the papers in order to defeat the statutes of limitation.

The fact that an unusually capable mortgagee personally prepared the papers and afterwards voluntarily declared the transaction to be just what they show it was, makes the decision of this Court worthy of review.

Argument.

PAROL EVIDENCE IS NOT ADMISSIBLE IN EQUITY TO SHOW THAT A MORTGAGE WAS INTENDED AS A DEED, EXCEPT WHERE RELIEF IS DULY AND SEASONABLY SOUGHT FOR MISTAKE OR FRAUD; NOR HAS A COURT OF EQUITY JURISDICTION TO REMEDY SUPPOSED HARDSHIP BY DISREGARDING THE FUNDAMENTALS OF EQUITY JURISPRUDENCE.

We have been unable to find a single authority that parol evidence is admissible (except in an action to cancel or reform) to show that a mort-

gage was intended or should be construed as anything but a mortgage.

On the contrary, all the authorities agree that parol evidence is not admissible, either in equity or at law, to show that a mortgage was intended as anything but a mortgage, although the same authorities freely admit that parol evidence is admissible to prove that a deed was intended as a mortgage.

We respectfully refer the Court to the following cases and authorities, *each directly in point,* as supporting our contention:

Jones on Mortgages (7th Ed.) Sec. 277, pp. 363, 364

Jones on Evidence (Handbook) Sec. 499

Jones Commentaries on Evidence, Sec. 499

17 Cyc. 626

27 Cyc. 1023

20 A. & E. Ency. Law (2nd Ed.) 951

Devlin on Deeds (3rd Ed.) Sec. 1144

8 Ency. Evidence, 699, 700, 701

10 Ruling Case Law, 1023, 1024

Ferguson v. Miller, 4 Calif. 97

Goon Gan v. Richardson, 47 Pac. 762; 16 Wash. 373

Fowler v. Pendleton, 121 Md. 297, 302; 88 Atl. 124

Gassert v. Bogk, 19 Pac. 281, 285; 7 Mont. 585

Kunkle v. Wolfersberger, 6 Watts (Pa.) 126, 130; Gibson, C. J.

Brown v. Nickle, 6 Pa. 390, 391
Reitenbaugh v. Ludwick, 31 Pa. 131, 138
Woods v. Wallace, 22 Pa. 171, 176, 177
Snyder v. Griswold, 37 Ill. 216, 223
Johnson v. Prosperity L & B Ass'n, 94 Ill. App. 260
Voss v. Eller, 109 Ind. 260, 263; 10 N. E. 74
Proctor v. Cole, 66 Ind. 576
Wing v. Cooper, 37 Vt. 169, 183
Eckford v. Berry, 87 Tex. 415; 28 S. W. 937
Dunham v. McNatt, 39 S. W. 1016; 15 Tex. C. A. 552 (writ of error denied)
Adams v. Bateman, 29 S. W. 1124; Tex. C. A.

See also as to non-admissibility of surrounding circumstances, contemporaneous oral agreements or any parol or extrinsic evidence whatever.

Dean v. Nelson, 10 Wall. 158, 171
Veve v. Sanchez, 226 U. S. 234, 241
Hendricks v. Webster, 159 Fed. 927, 929
Shea v. Leisy, 85 Fed. 243

The reason why parol evidence is not admissible to convert a mortgage into a deed is clearly stated in *Jones on Mortgages* (7th Ed.) Sec. 277.

The parol evidence rule is the same in equity as at law.

Spriggs v. Bank, 14 Pet. 201, 206
Forsythe v. Kimball, 91 U. S. 291

The rules of evidence are the same in courts of equity as at law.

Bispham's Equity Jurisprudence (7th Ed.) Sec. 9

16 Cyc. 138
Greenleaf on Evidence (15th Ed.) Sec. 250
Whitehouse's Equity Practice, Vol. 1, p. 561

A court of equity is controlled by fixed rules and principles; mere hardship or moral right does not confer jurisdiction or warrant its exercise (*5 Ency. U. S. Sup. Ct. Rep.* 834 and cases cited).

As Chief Justice White so forcefully said in *Simpson v. United States,* 172 U. S. 372, 379:

> "*The rule by which parties to a written contract are bound by its terms, and which holds that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders by reference to the negotiations which preceded the making of the contract, or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement.* The principle was clearly announced in Brawley v. United States, 96 U. S. 108, 173, where it was said: 'All this is irrelevant matter. The written contract merged all previous negotiations, and it is presumed in law to express the final understanding of the parties. *If the contract did not express the true agreement, it was the claimant's folly to have signed it. The Court cannot be governed by any such outside considerations.* Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.'"

The parol evidence rule is a doctrine of substantive law and courts are forbidden to heed such evidence or any kind of extrinsic evidence, even if it were received without objection. See our main brief, page 30;

Chamberlayne on Evidence, Vol. 5, p. 4912 *et seq.*

Equity follows the law. This is one of the cardinal maxims of equity.

> "Wherever the rights or the situation of the parties are clearly defined, and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *aequitas sequitur legem* is strictly applicable."
>
> *Magniac v. Thomson,* 15 How. 281, 299
>
> *Hedges v. Dixon County,* 150 U. S. 182, 192.

> "Equity will not give a remedy in direct contravention if a positive rule of law. * * * This rule is recognized to the fullest extent in the equity jurisprudence of the United States. If a transaction is condemned under the force of legal rules, it cannot receive a more favorable consideration in a court of equity, on account of any hardship to particular parties; and legal rights acquired by the prosecution of a lawful demand in a lawful way will not be disturbed by the Chancellor."
>
> *Bispham's Equity Jurisprudence* (7th Ed.) Sec. 37
>
> *King v. Hamilton,* 4 Pet. 311, 328.

It is well settled that a misrepresentation or misunderstanding of the law will not vitiate a

contract where there is no misunderstanding of the facts (*Upton v. Tribilcock,* 91 U. S. 45, 50).

> "The rule that a mistake of law does not avail prevails in equity as well as at common law."
>
> *Upton v. Tribilcock,* 91 U. S. 45, 50
>
> *Utermehle v. Normant,* 197 U. S. 40, 56.

Captain Mathews, one of the mortgagees, drew the papers. He was then a lawyer, bank president and real estate operator. It is inconceivable that if only an option was intended, he would have drawn an absolute deed, with a concurrent purchase money mortgage and promissory notes, stamp the deed and the mortgage with the proper war stamps, and then promptly record the deed and the mortgage. In 1901, Captain Mathews and the lawyer-son of the other mortgagee formally admitted that in 1899 they had "sold" the property, taking notes therefor, "secured by a mortgage" (Rec. p. 59). Under what theory does the Court disregard such evidence and even fail to mention it in its opinion?

The doctrine of "once a mortgage, always a mortgage", applies if ever it does or can apply to any transaction (*Dean v. Nelson,* 1 Wall. 158, 171; see also page 15 of our main brief).

From the maturity of the notes in 1901 up to 1914, neither the mortgagees, their numerous attorneys, nor Watts and Davis (both lawyers) made any attempt to foreclose their mortgage, to clear the record or take possession of the land. Watts

and Davis did not acquire their interest until after the notes and mortgage had been barred by limitation.

> "The courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection."
>
> *Great Western Mfg. Co. v. Adams,* 176 Fed. 325, 327.

Nowhere is the justice of an adherence to the parol evidence rule more apparent than in this case. So far as known Col. Syme is the only living participant of the transaction of August, 1899. Senator Dorsey was at the time of the trial in a hospital in Los Angeles and has since died. Why draw papers if they can be disregarded in the remote future as easily as in this case?

ANALYSIS OF THE OPINION.

Appellant never admitted the truth of Col. Syme's testimony. Had appellant offered any evidence in rebuttal the Syme testimony would have become competent.

The statement of facts is predicated entirely upon incompetent parol testimony and the Dorsey statement, both of which when read by lawyers mean only a purchase money mortgage transaction.

The testimony of Col. Syme is based entirely on his understanding or misunderstanding of the

legal effect of the defeasance clause in the mortgage (Rec. pp. 44, 47, 48). It is a matter of common knowledge that parties to a mortgage transaction often believe that if the notes are not paid at maturity, the property is irredeemably lost, and "everything will be null and void, notes and all". The defeasance clause confuses them.

There is not a scintilla of evidence that there was any mistake in the preparation of the papers. In fact, Col. Syme said that the mortgage expressed the transaction as he understood it (Rec. p. 48).

This Court has simply chosen to accept the legal opinion of a somewhat headstrong (Rec. p. 45) and inexperienced layman who frankly said he did not know the difference between a deed and a mortgage (Rec. p. 47) but considered the mortgage "a straight deed of reconveyance and not a mortgage" (Rec. p. 47), and then pointed to the defeasance clause to prove that it was a straight reconveyance (Rec. pp. 44, 48).

The Dorsey ex parte affidavit is simply a statement of "best recollection" in 1914 of a real estate transaction in 1899, and of the language of the papers therein.

It is an admitted fact that Captain Mathews, one of the mortgagees and a lawyer, bank president and real estate operator, personally prepared the papers, and that the "indenture" is on a printed New York mortgage blank, marked "mortgage"

at the top and on the cover, and that he afterwards declared it a mortgage transaction.

True, the Copper Estate never took possession of the land. Neither did Watts and Davis do so until shortly before starting the title suits (Rec. p. 51), and then only by means of making a lease in June, 1914, to a settler, on which no rental had been paid at the time of the trial (see record in No. 2719). No one in fact had any right to take possession of the land until after December 14, 1914, when it was segregated from the public domain by the filing of the plat of survey.

The prompt recording of the Copper Estate deed certainly showed that it "asserted ownership"; that is the best and usual evidence of such an assertion.

If there was no "debt" why were notes signed, delivered and sent in for collection, and why did the mortgage contain a promise to pay those notes and give a power of foreclosure on default? The absence of a debt would not convert the mortgage into a sale *(Russell v. Southard,* 12 How. 139, 152), but the existence of a debt is necessary to convert an apparent sale into a mortgage (*Conway v. Alexander,* 7 Cranch. 218, 237).

The quotation in the opinion from Section 265 of *"Jones on Mortgages"* is expressly applicable only to changing an "absolute deed into a mortgage". This Court is changing a mortgage into a deed and not a deed into a mortgage. The Court apparently overlooked the distinction.

Furthermore, the cited section (No. 265) from *"Jones on Mortgages"* is part of Chapter VII headed "Absolute Deed and Agreement to Reconvey", and of Part II thereof headed: "When they constitute a sale or a conditional sale".

Besides the distinction is clearly brought out by Section 277 of the same work (7th Ed. pp. 363, 364):

> "But if the instrument on its face be a mortgage, or if a deed and bond of defeasance be executed together as part of the same transaction, and therefore constitute a mortgage, parol evidence is not admissible to show that the parties intended that the transaction should operate as a conditional sale. It is then for the court to construe the instruments and determine their legal effect. Parol evidence, if admitted, would contradict the writing; the court must construe the instrument without resort to parol proof. No agreement or intention of the parties, whether at the time of the transaction or subsequently, can change the redeemable character of a mortgage."
>
> "And on the other hand parol evidence is admissible in equity to show that a formal conveyance with a defeasance executed at the same time or afterward, constituted in fact a mortgage and not a conditional sale."
>
> "But although a formal conveyance can be shown to be a mortgage by extrinsic evidence a formal mortgage cannot be shown to be a conditional sale. The reason of the rule, that a formal conveyance may be shown by parol to be a mortgage, while a formal mortgage can not be shown to be a conditional sale by the same means, is, that 'in the one case such proof raises an equity consistent with the writing, while in the other it would contradict the writing.'"

To show that Mr. Jones appreciated the distinction he made, we refer the Court to his reiteration thereof in Section 499 of his two treatises on Evidence.

Daniels v. Lowery, 92 Ala. 519, was an action to declare an absolute deed to be a mortgage and has no application in this case.

Peugh v. Davis, 96 U. S. 332, was also an action to declare an absolute deed to be a mortgage. The Court therein stated (p. 337) that the equity of redemption cannot be waived at the time of the mortgage and that "this is a doctrine from which a court of equity never deviates".

In the case at bar, the equity of redemption in the mortgage is sworn away after a delay of sixteen years by the legal opinion of a lay mortgagee, in opposition to the legal opinion of the lawyer mortgagee (Rec. p. 59); and upon a statement of mixed colloquial and confused technical terms prepared by Mr. Davis (a lawyer) and signed by Senator Dorsey (a layman), to obviate the legal effect of what is clearly a mortgage, and solely on the legal opinion of two laymen.

Peugh v. Davis and the cases which follow it have never been applied to change a mortgage into a sale, but only to change a deed into a mortgage or to show illegal object in a transaction.

The citation from *Pomeroy's Equity Jurisprudence* is of a section headed: "A conveyance abso-

lute on its face may be a mortgage". Nothing more need be said.

Campbell v. Dearborn, 109 Mass. 130, was also an action to declare an absolute deed to be a mortgage.

The appellant was "resurrected and resuscitated" by the *appellees* who brought it into Court. On the day following the decision of the United States Supreme Court which put value into the property, appellees sought in high-handed fashion to debar the appellant from its lawful rights. The answer of the appellant was the natural and obvious response thereto.

The appellant does not contend that "it acquired title to 99,000 acres of land" under the transaction in question. This is explained elsewhere herein and ample refutation is made of the statement that appellant never "paid a dollar" for what it got.

The statement that the argument of the appellant, if successful, would constitute a "monstrous fraud" is an unjust and an unwarranted characterization of the statutes of limitation and the doctrine of laches, and of the argument of this appellant in an action in which it is defendant and not plaintiff.

FACTS OVERLOOKED BY THIS COURT.

In 1899 Mathews and Syme had been negotiating with Dorsey to sell him their title to Baca Float No. 3 for $125,000 cash, and in May 1899 had

cancelled a contract of sale because Dorsey had not met a $25,000 payment. On August 3, 1899, very shortly after the promulgation of the Secretary's opinion of July 25, 1899 (29 L. D. 44), which declared invalid the 1866 location to which Mathews and Syme claimed title, they went to New York. Instead of insisting upon $125,000 cash, they accepted $5,000 cash from Dorsey and $100,000 in mortgage notes and divided the cash and the mortgage notes amongst themselves and Col. Boyce. They knew of the decision (Rec. p. 41), but apparently Dorsey did not (Rec. pp. 81, 83).

The statement in the opinion that nothing was ever paid for the property was inadvertently made. The statement of Col. Syme that he "considered" the transaction only an option and the $5,000 as only consideration for the option must be considered in connection with the exigencies of the appellees' case. There is no dispute, however, that Mathews, Syme and Boyce divided $5,000 cash amongst them on August 3, 1899, and also $100,000 in mortgage notes.

There is also no dispute of the fact that immediately after the transaction, Senator Dorsey went to Washington and found that instead of getting a good title as had been represented to him, he had received something which was commercially impossible, its exact location in controversy, his title clouded by three conflicting chains of title, and the Government denying the validiy of both locations

and of all the titles. This is what caused Dorsey to abandon the transaction (Rec. pp. 59, 81, 83). The blame should be placed upon Mathews and Syme, who sold the property, and not upon the Copper Estate whom they induced to buy it.

In this connection let it be stated that instead of the 99,000 acres mentioned in the papers and in the Court's opinion in this case, the utmost that the appellees herein contend in No. 2719 is that only one-half of that acreage could pass. The candid opinion of the counsel for the Santa Cruz Development Co. is that the papers passed title at most to only about 5,000 acres, being the overlap between the 1863 and 1866 locations.

If there is a potential "monstrous fraud" in this case, it is difficult to see where it occurred, what it was or who perpetrated it. Certainly if the Copper Estate had paid off the mortgage notes on their maturity in 1901, it would not have been the beneficiary of a good bargain. Until the mandate of the United States Supreme Court, in November, 1914, the United States Government contended that none of the title claimants had any title at all. When the title litigation is terminated, the winner or winners must still contend with numerous adverse settlers and patentees, pay about $60,000 of taxes for 1915 and 1916, and contest about $75,000 additional taxes. Besides this case and No. 2719, there will be at least two other difficult

cases to be decided by this Court or the United States Supreme Court.

CONCLUSION.

It is not for us to say, nor for this Court to decide, which party has abstract justice on its side. That can only be determined by considerations which do not appear upon this record and have no place therein. The appellees boldly and precipitously started the litigation in both cases—litigation which will undoubtedly end in the Supreme Court—and they must expect, when they ask the Court to remodel or disregard in whole or in part over a dozen deeds in No. 2719, and to make a summary and unprecedented disposition of the case at bar, that somewhere in their course they will be confronted with adverse rules of law and equity jurisprudence.

In order that the Bench and Bar may know the extent of this Court's decision, if this application be denied, we ask the Court to print in full in its opinion the mortgage from the Copper Estate to Mathews and Syme (with all its endorsements) from the original sent up with the record, the Mathews-Syme statement (Rec. p. 59), the Dorsey statement, and also a recital that the appellant was in fact duly incorporated, and that one of the mortgagees (a lawyer, bank president and real

estate operator) personally prepared the papers on a New York printed mortgage blank.

We certify that in our judgment this petition and application are well founded and not interposed for delay.

Respectfully submitted,

J. N. GILLETT,
F. A. CUTLER,
BEN C. HILL,
G. H. BREVILLIER,
Counsel for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

F. A. CUTLER,
Of Counsel for Appellant and Petitioner.